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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RODOLFO SANDOVAL,

Defendant and Appellant.

2d Crim. No. B205419
(Super. Ct. No. 2006015816)
(Ventura County)

Rodolfo Sandoval appeals a judgment after his conviction of first degree murder (Pen. Code, §§ 187, 189),[1] with special findings that he committed the offense for the benefit of a criminal street gang, was an active participant in the gang, and that he personally discharged a firearm to cause the death of Ryan Briner (§§ 190.2, subd. (a)(22), 12022.53, subds. (d) & (e)(1)). We conclude, among other things: 1) the trial court did not err by admitting gang evidence, 2) evidence about a gang edict against drive-by shootings was admissible as modus operandi evidence, 3) the admission of testimony that mentioned Sandoval's custody status was not reversible error, 4) Sandoval's jail conversations and phone calls were properly admitted, 5) the source material used by the gang expert was sufficiently reliable, 6) evidence that Sandoval was involved in a prior assault on Shawn Mickelson one day before the murder was properly admitted, 7) the Confrontation Clause did not bar admission of a witness's testimony about a conversation

[1] All statutory references are to the Penal Code unless otherwise stated.

between Sandoval and his accomplice, 8) the court did not abuse its discretion by ordering restitution in the amount of $51,000, but 9) the court erred by imposing a 10-year gang enhancement. We strike the gang enhancement. In all other respects, we affirm.

FACTS

On the evening of May 5, 2004, Sandoval and Javier Acevedo, Avenue gang members, drove into a residential neighborhood, an area that the rival Montalvo gang claims as part of its territory. Ryan Briner was walking down the street. Sandoval believed Briner was challenging them. Acevedo stopped the car. He and Sandoval got out and approached Briner. Sandoval fired two shotgun blasts at Briner. Sandoval left the scene as Briner, who was unarmed, was lying on the street mortally wounded.

Dr. Janice Frank, the assistant chief county medical examiner, performed Briner's autopsy. She testified that Briner had a shotgun wound to his chest, which was consistent with someone "crouching and turning as the gun was fired at him." He had another shotgun wound in his back that was fired from a further distance. She concluded that the first shot was fired into his chest and the second into his back. When the second shot was fired, Briner had turned and was moving away from the gun.

James Roberts, a sheriff's department forensic scientist, testified that the shotgun used in the murder prevents the shooter from firing a second round by simply pulling the trigger. The shooter must first manually slide down a pump reloading device to "re-rack a new round into the chamber." He said the shotgun shells found at the scene of the Briner and Mickelson shootings were fired from the same weapon. In the Briner shooting, the first shot was fired between three to five feet from Briner. The second shot was fired from a distance of 10 to 16 feet.

Patrick Stevens, a former Ventura police detective, testified that he examined the area surrounding Briner's body. The police found no knives or other weapons at the crime scene.

Anna Ruiz, Sandoval's girlfriend, testified that Sandoval and Acevedo were in the Avenue gang and their rivals included the Montalvo gang. Sandoval told her that they fought with the Montalvos; he referred to that as "gang banging." She said, "[O]ne

day when [Sandoval] was with me . . . [Acevedo] came by to pick him up." Acevedo told Sandoval that "there was some guys from Montalvo that they needed to go take care of . . . ." She said, "[Sandoval] got in the car with him and left." After the Briner shooting, Sandoval told Ruiz that he and Acevedo saw a "white boy in the street" who was "saying things to 'em," so "they stopped, and they both got out of the car." Sandoval said, "[T]hey had fucked him up and they left him [lying] in the middle of the street." He "didn't know if he . . . just fucked him up really bad or if he was dead." This incident took place in Montalvo territory.

Sandoval's Confession to Police

After his arrest, Sandoval tried to commit suicide in jail. He was transported to a hospital.

Sheriff's Deputy Danny Lopez testified that Sandoval said, "I just can't take this anymore." Sandoval told Lopez, "I see that guy's mom crying in court . . . . I know my mom's crying for me." Sandoval said he was riding in his friend's car. "[S]ome guy was dogging his friend, so they stopped the car . . . ." They got out and approached the "white dude" who "took his shirt off and started wrapping it around his fist . . . ." Sandoval said, "He had a gun. He had a knife or something. I'm not sure." Sandoval went back to the car, grabbed a shotgun and "pointed it at him," but "the guy kept coming towards him." Sandoval said, "I just wanted him to run away. Why didn't he run away?" Sandoval admitted shooting Briner.

The Assault on Mickelson on Catalina Street

On May 4, 2004, Acevedo and Sandoval were in a car that was following Shawn Mickelson's vehicle on Catalina Street. When Mickelson stopped, they got out and approached his car. One of them asked Mickelson, "You talking shit? You eyeballing us?" Sandoval then pointed a shotgun at Mickelson's face. Mickelson attempted to push the gun away. Acevedo grabbed the gun out of Sandoval's hands and then fired a shot to the lower front fender of the car.

Gang Expert Testimony

Police Officer Ryan Weeks, a gang expert, testified that he knew Acevedo was an Avenue gang member and he believed that Sandoval was also a member. He said that in a phone call in jail, Sandoval said, "I'm fucking Menace from The Avenue gang . . . ." Sandoval had told several police officers that he was a member of that gang. He wore gang gear and had drawn gang graffiti using his moniker "Menace." He and Acevedo wore "Ventura" on their bodies, the tattoo used by the gang.

Weeks testified that "putting in work" refers to the way gang associates show that "they're brazen enough to be part of the gang." They do this by "committing a violent act against another gang member from a rival gang." This could include killing a rival. The Avenue gang is affiliated with the Mexican Mafia, a prison gang, which is "in control of all Southern California Hispanic gangs." It ordered the gangs affiliated with it to stop committing drive-by shootings because innocent bystanders were being killed. Instead, "[t]hey encourage[] them to actually get out and have . . . up-close confrontations" with rivals. "[M]ad dogging" is a "hard stare, eye-to-eye contact" for an extended period. It is a way to challenge another gang member to a fight.

Answering a hypothetical from the facts of this case, Weeks concluded that the Briner shooting was for the benefit of the Avenue gang. It occurred on the turf of a rival gang, the Montalvos, because Sandoval believed Briner "was mad dogging them." This explains why they stopped to confront him.

Sandoval did not testify and the defense called no witnesses.

DISCUSSION

I. *Gang Evidence*

Sandoval contends that the trial court erred by admitting irrelevant and highly prejudicial gang evidence. We disagree.

The standard of review regarding the admission of gang evidence is whether the trial court abused its discretion. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.) "[I]t is proper to introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent." (*People v. Funes* (1994) 23 Cal.App.4th 1506,

1518.) "[E]vidence describing gang colors, behavior and areas of influence . . . [may have] a 'tendency in reason to prove' [citation] that defendant had a motive" to shoot a rival to the gang. (*People v. Williams* (1997) 16 Cal.4th 153, 194.)

Expert testimony on gang culture, habits and psychology does not usurp the jury's fact finding function. Such matters are beyond the common experience of jurors. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.)

Sandoval claims that Weeks's testimony was irrelevant and prejudicial. We disagree. It explained the motive behind the shooting of Briner. The testimony about the gang, its culture and the concept of "putting in work" showed why Acevedo and Sandoval, as Avenue gang members, entered Montalvo gang territory. Sandoval's testimony about "mad dogging" showed why they stopped and confronted Briner. It was directly tied to relevant issues and involved matters beyond the common experience of jurors. "[N]othing bars evidence of gang affiliation that is directly relevant to a material issue." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 588.)

II. *Evidence about the Mexican Mafia Gang*

Sandoval contends the testimony about the connection between the Mexican Mafia and the Avenue gang was introduced solely to denigrate Sandoval's character. But the People correctly note that Sandoval partially forfeited this issue. Sandoval did not object when Weeks first mentioned the connection between the two gangs or when he said the Mexican Mafia controls affiliates such as the Avenue gang.

Sandoval later unsuccessfully objected when Weeks testified that the Mexican Mafia had ordered its affiliates to confront rivals face to face instead of using drive-by shootings. But the testimony about the face-to-face confrontation requirement was relevant. Acevedo and Sandoval used that method to confront Mickelson and Briner. This showed a highly probative pattern of using a particular gang-related method of attacking Avenue rivals. It was relevant to the motive and intent for these shootings. (*People v. Funes, supra,* 23 Cal.App.4th at p. 1518.) Gang evidence is also properly admitted to show "modus operandi." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Sandoval has not shown an abuse of discretion.

III. *Evidence about Sandoval's Custody Status*

Sandoval notes that the prosecution also introduced evidence about five incidents while he was either in custody or being searched while on probation. He argues that evidence about a defendant's in custody or probation status "may not be admitted at trial merely to show criminal propensity or bad character."

But it was not admitted for that purpose. In each incident, Sandoval had displayed a gang moniker, had drawn Avenue gang graffiti, or had told officers that he was a member of the Avenue gang. The prosecution had to prove that he was an active Avenue gang member. This was a contested issue at trial. That he had brazenly displayed his gang affiliation in custody or to police officers was highly probative evidence. Considering the length of the trial, the references to his custody status were relatively brief. "[A]n isolated comment that a defendant is in custody simply does not create the potential for the impairment of the presumption of innocence that might arise were such information *repeatedly* conveyed to the jury." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1336.) Moreover, Sandoval has not shown prejudice. "[I]n certain circumstances a jury inevitably will learn a defendant is in custody . . . ." (*Ibid.*) This is such a case.

IV. *Evidence about Sandoval's Conversations and Phone Calls in Jail*

Sandoval argues that the court committed reversible error by admitting tapes and transcripts of his jail conversations and phone calls to friends from jail. We disagree.

The prosecution introduced transcripts of conversations between Acevedo and Sandoval in jail. This evidence was highly probative because these conversations showed their knowledge of the shooting incidents and their consciousness of guilt. In one conversation, Acevedo and Sandoval mentioned the dates of the Mickelson and Briner incidents. Acevedo warned Sandoval to "[b]e strong homie." Sandoval agreed. He told Acevedo that the police "[t]ried to spin me up," but "I'm like a rock." A trier of fact could reasonably infer that they initially agreed not to implicate the gang or each other. But Sandoval's consciousness of guilt was overwhelming. In a phone call to his sister a few weeks later, he said, "It's because of [Acevedo's] motherfuckin' ass I'm in here . . . ." He ultimately confessed to police.

Other conversations established Sandoval's gang affiliation. Sandoval told Acevedo that he had a sweater that contained the phrase "Ventura Avenue." He said that "out of respect" Acevedo should introduce himself to "all the homies." In a phone conversation from jail to Richard Rodriguez, Sandoval complained about someone "getting on [his] nerves." Rodriguez told him to "[l]ay him out." Sandoval said, "I'm fuckin' Menace from the Avenue Gang . . . ." In a call to his sister, Sandoval complained, "[T]his is a fucked up situation right here. This is a gang-related situation." In a phone call to Mauricio "Downer" Issac, Sandoval discussed another gang associate and said, "That fool was never a homie to begin with, dog. That fool never had it in him."

Sandoval claims these conversations were not relevant to the Briner murder. But the prosecution was also using them to prove gang allegations. The conversations showed Sandoval was an active Avenue gang member committed to the gang lifestyle. A defendant's statements may be used to show gang affiliation (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331), and gang evidence is properly admitted where, as here, "the very reason for the crime is gang related." (*People v. Ruiz* (1998) 62 Cal.App.4th 234, 239.)

Sandoval claims that some of the conversations involved matters not relevant to gang affiliation. The tapes included Sandoval's discussions about his active sex life and his girlfriends. But the prosecutor claimed it was relevant to show his "happy-go-lucky state of mind" when he was talking with "gangsters." She claimed it refuted his statements to police that he was distraught after killing Briner. The trial court agreed with the prosecution that his state of mind at that time was relevant. It also noted that to remove the sexual references would "slice and dice" the transcript. Sandoval has not shown an abuse of discretion. Gaps in the record could mean that other statements in the transcript would appear out of context. Jurors might also speculate that the missing portions were not as benign as discussions about sex.

But, even had the trial court erred, the result would not change. Sandoval has failed to show prejudice. The evidence of his guilt is overwhelming. He confessed to police that he shot Briner. This was his second confession. He had earlier confessed to

Ruiz. In his reply brief, Sandoval claims that he did not confess to murder; he only told police that he shot Briner in self-defense. But Sandoval has not raised a self-defense issue in this appeal. Yet, even so, the compelling evidence about the method of executing this crime would completely undermine such a claim. The testimonies of Frank, Roberts and Stevens show that Sandoval shot Briner in the chest. Sandoval then pumped to reload and fired a second shot to his back when Briner was fleeing for his life. Briner was unarmed. Sandoval's confessions and the testimonies of Ruiz and Weeks show the gang-related motive for the shooting.

V. *Qualifications and Foundation for the Gang Expert's Opinions*

Sandoval claims that Weeks's testimony was outside "the [s]cope of [his] [e]xpertise." But he did not preserve this issue for appeal. At trial, Weeks testified extensively about his knowledge, personal experience, training and expertise about Ventura County gangs. During this portion of his testimony, Sandoval raised no objections, nor did he request an expert voir dire examination prior to commencing Weeks's testimony about gangs.

Sandoval suggests that the court should have excluded all, or a major part, of Weeks's testimony. But Sandoval did not object during the direct examination of Weeks when he testified about the following issues: 1) the "nine criteria" to determine gang membership, 2) gang culture, 3) the concept of "putting in work" by committing violent crimes to elevate one's status within the gang, 4) gang hierarchy, 5) the ages of the active members of the Avenue gang, 6) the Avenue gang's territory, 7) its proclivity for violence, 8) its size, 9) the method police use to document the members and associates of the Avenue gang, 10) Avenue gang clothing and hand signals, 11) the concept of "mad dogging," 12) that Sandoval and Acevedo had "Ventura" tattoos, "a common tattoo used by" Avenue gang members, and 13) that the Avenue gang is affiliated with the Mexican Mafia, a prison gang. Because of his failure to object at trial, his current objections to any portion of this testimony are waived. (*People v. Lewis* (2008) 43 Cal.4th 415, 481.) But, even on the merits, the result is the same.

Sandoval claims that Weeks's testimony was inadmissible because he relied on hearsay. But "[t]he rule is long established in California that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions. Such sources may include hearsay." (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209.) "Expert testimony may also be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions." (*People v. Gardeley* (1997) 14 Cal.4th 605, 618.)

Sandoval suggests that Weeks's opinions about gangs were not based on reliable information and that he learned about them in police academy training. But Weeks had personal experience in this area. Weeks testified that he had arrested 100 gang members and had discussed gang culture with members of gangs. A gang expert may give opinions based on conversations with gang members. (*People v. Thomas*, *supra*, 130 Cal.App.4th at p. 1210.) "'[O]pinions may also be based upon the expert's personal investigation of past crimes by gang members and information about gangs learned from the expert's colleagues . . . .'" (*Ibid.*) Weeks said he had experience in investigating gang-related crimes and had conferred periodically with other county gang investigators to share information.

Sandoval contends that because Weeks relied in part on hearsay, Weeks's testimony violated his Confrontation Clause rights under *Crawford v. Washington* (2004) 541 U.S. 36. We disagree. "*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions . . . ." (*People v. Thomas*, *supra*, 130 Cal.App.4th at p. 1210.)

Sandoval suggests that the jury could have considered the hearsay sources of information relied on by Weeks to be the equivalent of proof of facts. But the trial court instructed jurors, "When Sgt. Weeks testified that in reaching his conclusions as an expert witness, he considered statements made by others. You may consider those statements

only to evaluate the expert's opinion. *Do not consider those statements as proof that the information contained in the statements is true*." (CALCRIM No. 360, italics added.) The court also instructed jurors with CALCRIM No. 332, which states, among other things, "You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence." Sandoval has not shown any abuse of discretion.

But, even had the court erred, any error would be harmless given the compelling evidence of Sandoval's guilt as shown by his confession to Ruiz. In addition, Ruiz's testimony independently established that Acevedo and Sandoval were Avenue gang members, that the Montalvos were the rival gang, and that Acevedo and Sandoval went "gang banging" in Montalvo territory. This evidence alone showed the motive for the Briner murder.

VI. *The Assault on Mickelson*

Sandoval contends the court erred by admitting evidence about the May 4th shooting incident described in Mickelson's testimony. He claims this incident was too dissimilar from the May 5th incident to be admissible and there was no evidence that he accompanied Acevedo, who was the one who fired the shotgun on May 4th. We disagree.

We review rulings on the admissibility of evidence to determine whether there was an abuse of discretion. (*People v. Memro* (1995) 11 Cal.4th 786, 864.) Evidence of a defendant's conduct on a prior occasion may be admitted to prove the defendant's motive or intent. (*Ibid.*; Evid. Code, § 1101, subd. (b).) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) Evidence of prior bad acts is also admissible to prove opportunity, a plan of action or knowledge. (*People v. Miller* (2000) 81 Cal.App.4th 1427, 1447.) "'[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish . . . the presence of the normal, i.e., criminal, intent accompanying such an act . . . .'" (*Ewoldt*, at p. 402.)

The two incidents were close in time, only one day apart. Both involved a similar pattern, the same duo, the same driver, the same car, the same shotgun. Both incidents involved the same goal of asserting their gang's authority by using Acevedo's shotgun against those who showed disrespect. Acevedo and Sandoval targeted Mickelson and Briner because their conduct was viewed as an affront to the gang's authority. Mickelson was "eyeballing" them, Briner was "mad dogging" them.

There was also a causal connection between the two incidents. Jurors could reasonably infer that Acevedo took the gun from Sandoval on Catalina Street because he had failed to perform "work." From Weeks's testimony, they could find that in gang culture this was a humiliation. But Sandoval was given a second chance to show that he was brazen enough to be an active gang member the following night when he confronted Briner who had challenged them in Montalvo territory. The Catalina Street incident was properly admitted because it showed the motive for the Montalvo shooting. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 15.)

Sandoval claims there is no evidence to show that he accompanied Acevedo. He notes that Mickelson could not positively identify him at trial. But Mickelson provided a description. He said the man with Acevedo was 19 to 20 years old, of "Mexican" nationality, and was taller and thinner than Acevedo. He also remembered that he had light-colored eyes. Sandoval correctly notes that Mickelson had forgotten some of the facts over the years. But the prosecution also called Police Officer Thomas Radwan. Radwan testified about the detailed description of the assailants, which Mickelson gave to police shortly after the incident. Sandoval has not shown why a trier of fact could not reasonably infer that he met that description.

In addition, in a jail conversation between Acevedo and Sandoval, they mentioned the May 4th and May 5th incidents, and Acevedo warned Sandoval to "[b]e strong homie." Sandoval agreed. The jury could reasonably infer from that conversation that Sandoval was involved in both incidents. There was additional evidence showing that Acevedo and Sandoval were a team with a pattern of "gang banging" together. They were together when Briner was killed and in an earlier incident when Acevedo told Sandoval

that they needed to take care of Montalvo gang members. They also rode together looking for Santa Barbara gang members. On the day after the Briner shooting, they were together in a mall. On another occasion, they had been seen in a park shooting Acevedo's shotgun. Gabriela Banuelos testified that Acevedo and Sandoval were friends and she often saw them together. She said Sandoval did not own a car; consequently, he rode in Acevedo's vehicle. The evidence is sufficient.

VII. *Ruiz's Testimony about Acevedo's Statement to Sandoval*

Sandoval contends the admission of Ruiz's testimony about the conversation she overheard between Acevedo and him contravened his rights under the Confrontation Clause. The People respond that Sandoval waived this issue by not objecting on this ground at trial. The People are correct.

Ruiz testified that she was with Sandoval when Acevedo arrived. She said that Acevedo told Sandoval that "there was some guys from Montalvo that they needed to go take care of." Sandoval left with Acevedo. Sandoval did not object to this testimony at trial.

In a pretrial motion, Sandoval's counsel initially raised a Confrontation Clause objection to the portion of Ruiz's testimony that the prosecution intended to introduce involving Acevedo's statement. But later in that hearing, his counsel said, "I suppose that if there's a conversation with Sandoval and Acevedo that Ruiz witnesses and [in] which Mr. Sandoval is a participant, then I'd be hard-pressed to object . . . ." Sandoval has not shown that he preserved this issue for appeal given this remark and his failure to object at trial. (*People v. Lewis, supra*, 43 Cal.4th at p. 481.) But an objection would be unavailing.

Sandoval acknowledges that Acevedo's statement may be admissible as an exception to the hearsay rule under state law. But, relying on *Lilly v. Virginia* (1999) 527 U.S.116, Sandoval claims that because Acevedo was an accomplice, his remarks cannot be used against him consistent with the Confrontation Clause. But *Lilly* is distinguishable. There the Supreme Court concluded that evidence of an accomplice's out-of-court statements was inadmissible and unreliable because: 1) the accomplice was in police

custody, 2) the police were involved in "the statements' production," and 3) the statements described "past events." (*Id.* at p. 137.) The court noted that an accomplice's statements while in custody may be inherently unreliable given the incentive he or she may feel to "shift or spread blame." (*Ibid.*)

But the unreliability factors discussed in *Lilly* are not present here. Acevedo was not in custody when he made this remark. Ruiz did not solicit his remarks and she was not a police agent. Acevedo's statements did not refer to Sandoval's past crimes, and he did not have an incentive to implicate Sandoval because he was talking to a friend, not the police.

In addition, Acevedo's statement was not inadmissible under *Crawford v. Washington*, *supra*, 541 U.S. 36. There the Supreme Court held that the Confrontation Clause precludes the admission of testimonial hearsay by a declarant who does not appear at trial, unless that person was unavailable and the defendant had a prior opportunity to cross-examine him or her. (*Id.* at pp. 53-54.) But testimonial hearsay that is inadmissible under *Crawford* involves an "accuser who makes a formal statement to government officers." (*Id.* at p. 51.) It does not involve statements by a person "who makes a casual remark to an acquaintance." (*Ibid.*; *People v. Jefferson* (2008) 158 Cal.App.4th 830, 842.) Consequently, Acevedo's remark was not "'testimonial' because it was not 'a formal statement to government officers.'" (*Jefferson*, at p. 842.)

Moreover, given the compelling evidence of Sandoval's guilt, any error in admitting this evidence would be harmless beyond a reasonable doubt.

VIII. *The Victim Restitution Order*

Sandoval contends the court erred by ordering him to pay restitution to Briner's parents. The People respond that Sandoval forfeited this issue by not objecting in the trial court. The People are correct.

At the sentencing hearing, the trial court ordered Sandoval "to pay restitution to Bo and Linda Briner in the amount of $51,000 pursuant to section 1202.4 of the Penal Code." Sandoval did not object and did not request a hearing. He consequently waived this issue. (*People v. Scott* (1994) 9 Cal.4th 331, 356.)

Sandoval contends his trial counsel was ineffective by not objecting. But because the record does not disclose counsel's reasons for this alleged omission, the ineffective assistance claim may not be resolved here. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

But, even so, Sandoval has not shown that the trial court abused its discretion. The probation report contained a handwritten statement from Briner's mother indicating that they sold their home and moved away because they could "never be near the spot where [Sandoval] killed" their son. The loss of their son caused them to experience "health problems, doctor visits, medical expenses, . . . depression, anguish, sleepless nights, headaches [and] heart problems . . . ." They incurred moving and travel expenses as well as the "emotional cost" for their loss. The probation officer noted that they had incurred travel and lodging expenses for attending two trials, the trial of Acevedo, Sandoval's accomplice, and Sandoval's trial. He calculated that their expenses totaled $51,000.

Sandoval cites no evidence to indicate that they incurred less than that amount in expenses. "'When the probation report includes information on the amount of the victim's loss and a recommendation as to the amount of restitution, the defendant must come forward with contrary information to challenge that amount.'" (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1048.) "Absent a challenge by the defendant, an award of the amount specified in the probation report is not an abuse of discretion." (*Ibid.*)

Sandoval claims the court erred by allowing economic damages for the Briners' costs of moving and relocation. He argues that he did not threaten Briner's parents and they did not claim that they moved because they felt they were in danger. But Sandoval concedes that they were "traumatized" by the death of their son and "would have been reminded of their son's death by [being in] their old neighborhood." Sandoval's actions were responsible for their decision to move away. "The trial court could reasonably conclude that the enormous emotional trauma resulting from the attack was such that [the parents] virtually had to move and this was an 'economic loss' resulting from defendant's conduct . . . ." (*People v. Mearns* (2002) 97 Cal.App.4th 493, 503.)

Sandoval finally argues that the procedure the court utilized to determine restitution contravenes due process. This claim is without merit. Sandoval had notice of the amount the probation department recommended as restitution. He was represented by counsel and had an opportunity to request a hearing. He has shown no constitutional infirmity.

IX. *The 10-Year Gang Enhancement*

The court sentenced Sandoval to life without the possibility of parole. It also imposed a 10-year gang enhancement (§ 186.22, subd. (b)(1)), which it stayed under Penal Code section 654. Sandoval contends that because he was sentenced to life without the possibility of parole, the 10-year gang enhancement must be stricken. The People agree. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1007.)

We have reviewed Sandoval's remaining contentions and conclude he has not shown any other reversible error.

The 10-year gang enhancement is stricken. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Edward F. Brodie, Judge

Superior Court County of Ventura

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